

**West Virginia Parkways, Economic
Development and Tourism Authority**

**Toll System Upgrade
Request for Proposals
RFP # TE-1-10**

Exhibit A
Draft Implementation Contract
Terms and Conditions

For

**Toll Collection Equipment
System Maintenance
Customer Account Management and
Violation Processing System**

January 2010

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1.0 General

1.1 *Governing Law:*

This contract shall be governed by the laws of the State of West Virginia, applicable provisions of the Legislative Rules of the Purchasing Division, and any unique Purchasing Rules promulgated by the Authority. The Contractor further agrees to comply with the Civil Rights Act of 1964 and all other applicable laws and regulations, Federal, State and Local Government.

1.2 *Compliance with Laws and Regulations:*

The Contractor shall be responsible for contacting the West Virginia Department of Tax and Revenue to determine any and all sales, employment, use, personal property, or any other tax responsibilities that may be incurred through any contracts, transactions, deliveries, or performance of services resulting from this RFP prior to submitting a Proposal. Any and all such taxes due are the sole responsibility of the Contractor and in no case shall the Authority accept, assume, or become otherwise entangled in any such responsibility.

The Contractor shall obtain and maintain at their own expense all necessary permits and other licenses to comply with all applicable laws, Federal, State or municipal, along with all regulations, and ordinances of any regulating body.

1.3 *Subcontracts/Joint Ventures:*

The Contractor is solely responsible for all work performed under this contract and shall assume prime contractor responsibility for all services offered and products to be delivered under the terms of this contract. The Authority will consider the Contractor to be the sole point of contact with regard to all contractual matters. The Contractor may, with the prior written consent of the Authority, enter into written subcontracts for performance of work under the resulting contracts; however, the Contractor is totally responsible for payment of all subcontractors.

1.4 *Order of Precedence:*

The RFP, RFP addenda, Contractor's technical proposal provided in response to the RFP, and Contractor's Price Proposal will be included as part of this contract by reference. This contract supersedes the RFP and any RFP addenda. The RFP and any RFP addenda supersede the Contractor's proposal in response to the RFP.

1.5 *Mandatory Requirements:*

Any specification or statement containing the word "must", "shall", or "will" is and shall be interpreted by the parties as mandatory.

1.6 Contractor Relationship:

The relationship of the Contractor to the Authority shall be that of an independent contractor. No partnership, joint venture or similar business entity, principal-agent relationship or employer-employee relationship is contemplated nor will any such relationship be created by the parties in entering this contract. The Contractor is solely liable for the acts and omissions of its employees and agents.

Contractor shall be responsible for selecting, supervising and compensating any and all individuals employed pursuant to the terms of this contract. Neither the Contractor, nor any employees or contractors of the Contractor, shall be deemed to be employees of the Authority for any purposes whatsoever.

Under this contract, the Contractor shall be exclusively responsible for payment of/to employees and contractors and subcontractors for all wages and salaries, taxes (including sales tax), withholding payments, penalties, fees, fringe benefits, professional liability insurance premiums, contributions to insurance and pension or other deferred compensation plans, including but not limited to, Workers' Compensation and Social Security obligations, and licensing fees, etc. and the filing of all necessary documents, forms and returns pertinent to all of the foregoing.

The Contractor shall not assign, convey, transfer or delegate any of its responsibilities and obligations under this contract to any person, corporation, partnership, association or entity without expressed written consent of the Authority.

1.7 Price Quotations:

The prices quoted by the Contractor in their Price Proposal will not be subject to any increase after Notice To Proceed and will be considered firm for the life of this implementation contract. Only price changes due to an Authority approved change order shall be allowed under the implementation contract.

The Authority shall have the right to purchase additional quantities of hardware, software, installation services, testing services, and other system implementation related services. The Contractor grants the Authority the right to make such purchases at any time during the life of the implementation contract at the prices quoted in their Price Proposal. The Authority will issue a change order for each such additional purchase. The price of each such purchase(s) shall be equal to that in the Contractor's Price Proposal adjusted for the change in the Consumer Price Index (CPI) which occurred between Notice To Proceed and the month prior to issuance of the change order, provided however, CPI will not be applied if there is not a current price in the Contract for

additional purchase items.

Reference is hereby made to Section 4.1.1 through 4.1.3 for terms, conditions and pricing of optional and additional system work where pricing is not provided or not comprehensive.

1.8 Indemnification:

The Contractor agrees to indemnify, defend and hold harmless the Authority, its members, officers, employees and agents, from and against any and all claims, demands, causes of action, debts and other liabilities including attorney fees and expert fees including but not limited to the following: (1) Any claims or losses for services rendered by any subcontractor, person or firm performing or supplying services, materials or supplies in connection with the performance of this contract; (2) Any claims or losses resulting to any person or entity injured or damaged by the Contractor, its officers, employees, or subcontractors by the publication, translation, reproduction, delivery, performance, use or disposition of any data used under this contract in a manner not authorized by the contract, or by Federal or State statutes or regulations; (3) Any failure of the Contractor, its officers, employees or subcontractors to observe State and Federal laws, including but not limited to labor and wage laws; and (4) Contractor shall indemnify and hold harmless the Authority, its members, officers, employees and agents from an against any and all claims, demands, cause of action, debts, or other liabilities (including attorney's fees and expert fees) made against or owed by the Authority (which shall be deemed to include its officers, employees, subcontractors, consultants, agents and subcontractors) in any way relating to a claim for infringement of patents, or inducement to infringe, copyrights, trademarks, trade secrets or any other third party proprietary rights, arising as a result of the Authority's use of, or the Contractor's supplying, the New Toll Collection System, including any Equipment, Software or Services. Contractor shall defend any claim with counsel designated by the Authority against which the Contractor has no reasonable objection. Without limiting the generality of the foregoing or limiting any other remedies of WVPEDTA, if the New Toll Collection System or any item of Equipment or the Software or any portion thereof is held to constitute an infringement and its use is (or may be) enjoined, the Contractor, at its option and expense, will (i) obtain a license for the WVPEDTA to use the alleged infringing item, or (ii) modify or replace the alleged infringing portion.

Contractor shall hold harmless and defend the Authority from and against any and all claims including but not limited to the payments, withholdings, contributions, taxes, social security taxes and employer income tax returns referred to in the next preceding paragraph. Contractor shall obtain coverage for this contractual indemnity in the insurance policy provided for in Section 1.11 of this Contract.

The Contractor shall inform the Authority if any subcontractor, consultant, agent or supplier providing goods or services to the Authority is or shall become a party to any litigation involving patent or copyright infringement trademark violation, antitrust or other trade regulation or proprietary rights claim or is or shall become subject to any injunction which may prohibit it from providing Equipment, Software or Services hereunder. The Authority may reject any such subcontractor, consultant, agent or supplier, if in the Authority's judgment use thereof would delay the implementation of the system or be unlawful.

The Authority shall give the Contractor notice, with reasonable promptness, of any Claim received by it for which indemnification is sought hereunder, and the Contractor shall assume, as aforesaid, the primary defense thereof, including appeals. The Authority shall, upon the Contractor's request and at the Contractor's expense, furnish information and assistance available to it and provide reasonable cooperation as requested to facilitate the defense and/or settlement of any such Claim. Notwithstanding the foregoing, the Authority may elect, at its own expense, to defend or participate in the defense of any Claim in which it is a named defendant, provided that if Contractor has not abandoned or otherwise abrogated the defense of any such claim and the Authority settles such Claim without the Contractor's prior written consent, the Contractor shall have no obligation to indemnify and hold harmless the Authority against any cost, loss or expense of any kind or nature arising out of such Claim.

The indemnification shall not extend to any alleged infringement or violation to the extent that it: (i) shall result from the Authority's use of the upgraded toll system or any component thereof other than as provided in this Contract, or (ii) relates to use of Equipment or Software in combination with other equipment or software, furnished either by the Authority or by others, which combination is not consistent with the Contract, if such claim would have been avoided but for such combined use.

1.9 *Record Retention (Access & Confidentiality):*

Contractor shall comply with all applicable Federal and State of West Virginia rules and regulations, and requirements governing the maintenance of documentation to verify any cost of services or commodities rendered under this contract by Contractor. The Contractor shall maintain such records for a minimum of five (5) years and make available all records to Authority personnel or its auditors at Contractor's location during normal business hours upon written request by Authority within ten (10) days after receipt of the request.

Contractor shall have access to certain applicable private and confidential data maintained by the Authority to the extent required for Contractor to carry out the duties and responsibilities defined in this contract. Contractor agrees to maintain confidentiality and security of the data made available and shall indemnify and hold harmless the Authority against any and all claims brought by any party attributed to actions of breach

of confidentiality by the Contractor, subcontractors or individuals permitted access by Contractor.

1.10 Contract Bond

The selected Contractor shall at its own expense procure and maintain a Contract Bond through Project Acceptance. The Vendor shall procure this Contract Bond from a surety company duly authorized to issue surety in West Virginia and whose name appears on the current list of the Treasury Department of the United States as acceptable as surety upon federal contracts. This Contract Bond shall be payable directly to the Authority for the amount shown on Sheet 1 of the Contractor's Price Proposal.

A form of this bond and certifications acceptable to the Authority are provided in Section 8 below.

1.11 Insurance Requirements:

The selected Contractor shall at its own expense procure, maintain over the life of the contracts, and provide evidence that all of the following insurance policies are in force prior to execution of the contracts. Said policies shall be countersigned by an Agent licensed by the State of West Virginia and incorporate the printed name, street address, zip code and West Virginia license number of said Agent. Said policies shall provide for at least 30 days notice prior to cancellation and said notice shall be made directly to the Authority.

These policies shall not be construed to relieve the Contractor for liability in excess of such coverage, nor shall it preclude the Authority from taking such other actions as are available to it under any other provision of the contracts or otherwise in law.

Commercial general liability (CGL) coverage with limits not less than:

General Aggregate	\$2,000,000
Products Completed Operations Aggregate	\$2,000,000
Personal & Advertising Injury	\$1,000,000
Each Occurrence	\$1,000,000
Fire Damage	\$ 50,000
Medical Expense Limit	\$ 5,000

The CGL shall be written on ISO occurrence form CG 00 01, or equivalent, and shall cover liability arising from premises-operations, independent contractors, products-completed operations, personal injury and advertising injury, and liability assumed under an insured contract. There shall be no endorsement or modification of the CGL limiting the scope of coverage for liability arising from explosion, collapse, or underground

property damage whenever work involving these exposures is undertaken. The CGL policy shall include endorsements that amend the aggregate limits of insurance to be applicable to each implementation project separately.

Employer's Liability Insurance including coverage to protect the Contractor for claims brought under Section 23-4-2 of West Virginia Code. The limits of this insurance shall not be less than:

Each accident	\$2,000,000
Each disease	\$2,000,000
Each disease employee	\$1,000,000

Reference is hereby made to attachments 8.4 and 8.5 which are forms which must accompany this agreement.

1.12 Force Majeure

The Authority is and (subject to the provisions of Section 4.3 hereof) Contractor may be excused from performance hereunder if such non-performance results from acts of God, war, riots, acts of governmental authorities, or any other cause that could not have been reasonably anticipated and which could not be overcome by the exercise of due diligence or planning by the non-performing party. In the event of the occurrence of a Force Majeure event, the party unable to perform shall promptly notify the other party. It shall further pursue its best efforts to resume performance as quickly as possible and shall suspend or delay performance only for such period of time as is necessary as a result of the Force Majeure event. In such event, the time for the performance of the obligations under this Agreement will be extended for a period commensurate with the delay but the Contractor will receive no additional compensation.

Contractor agrees to take all reasonable and appropriate actions to mitigate the impact of damages and delays in all circumstances, including but not limited to, such actions of Contractor, re-sequencing, reallocating or redeploying resources.

1.13 System Warranty

Contractor shall, at its sole cost, repair or replace, at its option, any item of hardware, software or firmware or any construction item whose non-performance is discovered or which is defective either in material or workmanship and made known to Contractor in writing by the Authority during the contract warranty period which is 12 months from the warranty commencement. The system warranty commences upon Project Acceptance.

1.14 System Maintenance

Contractor will provide maintenance for the System hardware and software in accordance with the Maintenance Agreement to be negotiated and executed simultaneously with this Contract and prior to commencement of maintenance services.

2.0 Representations, Certifications, & Warranties

2.1 Contractor Registration:

The Contractor represents and warrants that it has completed, paid for, and filed a **Contractor Registration and Disclosure Statement** (Form WV-1) to the satisfaction of the West Virginia Purchasing Division prior to the execution of this contract.

2.2 Purchasing Affidavit:

The Contractor represents and warrants that it has, in accordance with West Virginia Code §5A-3-10a, submitted a signed affidavit regarding any debt owed to the State.

2.3 Conflict of Interest:

The Contractor represents and warrants that it, its officers or members or employees at present have no interest and shall not acquire any interest, direct or indirect, which would conflict or compromise in any manner or degree with the performance of its services hereunder. The Contractor further covenants that in the performance of the Contract, the Contractor shall periodically inquire of its officers, members and employees concerning such interests. Any such interests discovered shall be promptly presented in detail to the Authority.

2.4 Prohibition Against Gratuities:

The Contractor represents and warrants that it has not employed any company or person other than a bona fide employee working solely for the Contractor or a company regularly employed as its marketing agent to solicit or secure this contract and that it has not paid or agreed to pay any company or person any fee, commission, percentage, brokerage fee, gifts or any other consideration contingent upon or resulting from the award of this contract.

For breach or violation of this warranty, the Authority shall have the right to annul the RFP award and this contract without liability at its discretion and pursue any other remedies available under this contract or by law.

2.5 Certifications Related to Lobbying:

Contractor certifies that no federal appropriated funds have been paid or will be paid, by or on behalf of the company or an employee thereof, to any person for purposes of influencing or attempting to influence an officer or employee of any Federal entity, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any

Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment or modification of any Federal contract, grant, loan or cooperative agreement.

If any funds other than federally appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee or any agency, a Member of Congress, an officer or employee of Congress or an employee of a Member of Congress in connection with this Federal contract, grant, loan or cooperative agreement, the Contractor shall complete and submit a disclosure form to report the lobbying.

Contractor agrees that this language of certification shall be included in the award documents for all sub-awards at all tiers, including subcontracts, sub-grants, and contracts under grants, loans, and cooperative agreements, and that all sub-recipients shall certify and disclose accordingly.

2.6 Disputes:

Any controversy, claim or dispute arising out of, or related to this Agreement or any breach thereof may be settled amicably by the parties through a mediation process in accordance with the applicable mediation guidelines prevailing in West Virginia. If the mediation process does not result in an acceptable settlement of the controversy, claim or dispute, then the matter may be resolved in a court of competent jurisdiction in the State of West Virginia.

2.7 Ownership:

2.7.1 Title:

Except for contingent title rejection, title to the hardware components provided pursuant to this Agreement shall pass to the Authority upon receipt of payment associated with such hardware from the Authority and installation at the respective Authority work site. The Contractor represents and warrants that it will have absolute and good title to the hardware components, free and clear of all liens, encumbrances or any claims of any kind whatsoever at the date of the transfer of title and it will transfer same to the Authority.

Notwithstanding the fact that the Authority may have been deemed to have accepted title in accordance with the previous Section, title acceptance is contingent upon full system acceptance by the Authority, accordingly, in the event the system is not fully accepted by the Authority as contemplated by this agreement, it shall have the right, at its election, to reject title to any or all components comprising all or any part of the system, and thereupon receive a refund from Contractor for any amounts paid for such rejected items.

2.7.2 Software Ownership/Proprietary Information:

(a) All software and associated software manuals and documentation shall be supplied to the Authority pursuant to the provisions of the Software License Agreement, which forms

a part of this contract and is attached hereto as Section 6.0. This License Agreement entitles the Authority to a perpetual, royalty fee, non- exclusive license to use the software and associated manuals and documentation supplied by Contractor with the equipment furnished hereunder.

(b) Ownership of all data, materials, drawings, manuals, training materials and documentation originated and prepared for the Authority pursuant to the RFP and all updates thereto shall belong exclusively to the Authority and be subject to public inspection in accordance with the West Virginia Freedom of Information Act. Trade secrets or proprietary information submitted by a Proposer may not be subject to public disclosure under the West Virginia Freedom of Information Act; however the Proposer may be requested to invoke these protections pursuant to Section 4(1), Article 1, Chapter 29B of the West Virginia Code, in writing, by indentifying in writing such trade secrets or proprietary information either before or at the time the data is submitted. The written notice must specifically identify the data or materials to be protected and state the reasons why protection is necessary. The proprietary or trade secret material submitted must be identified by some distinct method such as highlighting or underlining and must indicate only the specific words, figures or paragraphs that constitute trade secret or proprietary information. The classification of any entire bid document, line item prices or prices as proprietary or trade secrets is not acceptable and may result in rejection and return of the proposal.

2.8.1 Non-Waiver of Rights:

Failure on the part of the Authority to strictly enforce any of the terms or conditions of this Agreement to be performed by the Contractor, or to exercise any rights or remedies, shall not be construed as a waiver of the Authority's rights to assert any of the same, or to rely on any such terms or conditions at any time thereafter.

2.8.2 Assignment:

This Agreement, any duties hereunder, or interest herein may not be assigned or delegated by either party without express written consent of the other party which will not be unreasonably withheld. Any attempt by the either to assign any of the rights, duties or obligations of this Agreement without such consent shall be null and void. Notwithstanding the above, the Authority has the right to assign to a successor agency which would have the same obligation as the current Authority. Successors and assigns of Authority must be a governmental agency, bureau, commission, or similar governmental entities, otherwise prior written consent is required.

2.9 Governing Law:

This Agreement shall be governed by and construed under the laws of the State of West Virginia. It is agreed that in absence of any provision relating to the sale of goods, the West Virginia Uniform Commercial Code shall govern the rights, duties and remedies of the parties.

2.9.1 Severability:

If any provision of this Agreement shall to any extent be held invalid or unenforceable, the remainder of this Agreement shall be deemed unaffected thereby.

2.9.2 Notices:

Any notice or communication to the Contractor shall be deemed served if it is delivered, in writing, personally or by registered or certified mail to:

3.0 Schedule:

The following schedule shall be adhered to.

MILESTONE	DATE
Contract Approval and Notice To Proceed	May 3, 2010
Factory Acceptance Test completed and approved by the Authority	March 31, 2011
Host, CSC, VPC, and MOMS installed and approved by the Authority for revenue collection	April 30, 2011
All systems installed and approved by the Authority for revenue collection	May 31, 2011
Additional key milestones agreed upon during contract negotiations	July 31, 2011
Project Acceptance	October 31, 2011

4.0 Contract Term, Changes, and Termination

4.1 *Term of Contract:*

This contract shall be effective from its execution in full by the Authority and the Contractor until (Month) _____, 20__.

4.1.1 *Optional System Items*

The Authority reserves the right and option to require the Contractor to provide for Acquisition, Implementation, Costs and Optional System Items which may be exercised at the sole discretion of the Authority, provided that notice of such intent to exercise is provided to the Contractor by the Authority no later than _____.

Changes in the Contract or the work required as a result of exercise of these options by the Authority may be accomplished after execution of this Contract, and without invalidating the Contract, by Change Order, Construction Change Directive or Order for a minor change in the Contract, subject to the limitations stated in the Contract.

A Change Order shall be based upon agreement among the Authority, Contractor and Engineer (HNTB Corporation). A Construction Change Directive requires agreement by the Authority and the Engineer and may or may not be agreed to by the Contractor. An Order for a minor change in The System may be issued by the Engineer alone.

Changes in The System shall be performed under applicable provisions of the Contract, and the Contractor shall proceed promptly therewith, unless otherwise provided in the Change Order, Construction Change Directive or Order for a minor change in The System.

If the unit prices are stated in the Contract or subsequently agreed upon, and if quantities originally contemplated are so changed in a proposed Change Order or Construction Change Directive that application of such unit prices to quantities of work on The System proposed will cause substantial inequity to the Authority or Contractor, the applicable unit prices shall be equitably adjusted.

4.1.2 *Change Orders*

A Change Order is a written instrument prepared by the Engineer and signed by the Authority, Contractor and Engineer stating their agreement upon items including but not limited to the following:

- (1) a change in The System;
- (2) the exercise of the options of the Authority described in 4.11 above;

- (3) the amount of any adjustment in the Contract Sum; and
- (4) the extent of the adjustment in the Contract Time, if any.

Methods used in determining adjustments to the Contract Sum may include those methods described under Construction Change Directives.

- (5) Any changes resulting from an occurrence under 4.2 below.

4.1.3 Construction Change Directives

A Construction Change Directive is a written order prepared by the Engineer and signed by the Authority and Engineer directing a change in the System and stating a proposed basis for adjustment, if any, in the Contract Sum or Contract Time, or both. The Authority may by Construction Change Directive, without invalidating the Contract, order changes in The System within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and Contract Time being adjusted accordingly.

A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order.

If the Construction Change Directive provides for an adjustment to the Contract Sum, the adjustment shall be based on one of the following methods:

- (1) mutual acceptance of a lump sum properly itemized and supported by sufficient data to permit evaluation;
- (2) unit prices stated in the Contract, RFP or subsequently agreed upon;
- (3) cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed fee.

Upon receipt of a Construction Change Directive, the Contractor shall promptly proceed with the change in the work involved and advise the Engineer of the Contractor's agreement or disagreement with the method, if any, provided in the Construction Change Directive for determining the proposed adjustment in the Contract Sum or Contract Time.

A Construction Change Directive signed by the Contractor indicates the agreement of the Contractor therewith, including adjustment in the Contract Sum and Contract Time or the method for determining them. Such agreement shall be effective immediately and shall be recorded as a Change Order.

If the Contractor does not respond promptly or disagrees with the method the adjustment shall be determined by the Engineer on the basis of reasonable expenditures and savings of those performing the work on The System attributable to the change, including, in case of an increase in the Contract Sum, a reasonable allowance for overhead and profit. In such case, the

Contractor shall keep and present, in such form as the Engineer or the Authority may prescribe, an itemized accounting together with appropriate supporting data. Unless otherwise provided in the Contract, cost shall be limited to the following:

- (1) cost of labor, including social security, unemployment insurance, fringe benefits required by agreement or custom, and workers' compensation insurance;
- (2) costs of materials, supplies and equipment, including cost of transportation, whether incorporated or consumed;
- (3) rental costs of machinery and equipment, exclusive of hand tools, whether rented from the Contractor or others;
- (4) costs of premiums for all bonds and insurance, permit fees, and sales, use or similar taxes related to the work; and
- (5) additional costs of supervision and field office personnel directly attributable to the change.

Pending final determination of cost to the Authority, amounts not in dispute may be included in applications for payment. The amount of credit to be allowed by the Contractor to the Authority for a deletion or change which results in a net decrease in the Contract Sum shall be actual net cost as confirmed by the Engineer or the Authority. When both additions and credits covering related work on The System, system maintenance or substitutions are involved in a change, the allowance for overhead and profit shall be figured on the basis of net increase, if any, with respect to that change.

If the Authority and Contractor do not agree with the adjustment in Contract Time or the method for determining it, the adjustment or the method shall be referred to the General Manager of the Authority for determination.

When the Authority and Contractor agree with the determination made by the Engineer or the Authority concerning the adjustments in the Contract Sum and Contract Time, or otherwise reach agreement upon the adjustments, such agreement shall be effective immediately and shall be recorded by preparation and execution of an appropriate Change Order.

MINOR CHANGE IN THE WORK. The Engineer or the Authority will have authority to order minor changes in the work on The System not involving adjustment in the Contract Sum or extension of the Contract Time and not inconsistent with the intent of the Contract Documents. Such changes shall be effected by written order and shall be binding on the Authority and Contractor. The Contractor shall carry out such written orders promptly.

4.2 Change in the Applicable Law:

Any final and unappealable change in Federal or State law, or court decisions which

constitute binding precedent in West Virginia, and which significantly alter the Contractor's required activities or any change in the availability of funds, shall warrant good faith renegotiation of the compensation paid by or due to the Contractor from the Authority and of such other provisions of the contract that are affected.

If any other changes to this contract become necessary, a formal contract change order will be negotiated by the Authority and the Contractor in each case, to address any changes to the terms and conditions, including the costs of work included under this contract. An approved contract change order must be in writing with proper date and executed by a duly authorized representative of the Authority and placed in the U.S Mail postage prepaid or delivered by other appropriate means to the Contractor prior to the effective date of the contract amendment contemplated by the change order. An approved contract change order is required whenever the change affects: (a) the payment provision; (b) the scope of the work; (c) date of completion of the Work or any portion thereof; (d) a change in the date for any deliverables; or a like provision. Such changes may be necessitated by new and amended Federal and State regulations and requirements.

As soon as possible after receipt of a written change request from the Authority, but in no event more than thirty (30) days thereafter, the Contractor shall determine if there is an impact on price with the change requested and provide the Authority a written statement identifying any price, schedule and/or performance impacts on the contract or to state that there is no impact. In the event that price will be impacted by the change, the Contractor shall provide a description of the price increase or decrease involved in implementing the requested change.

No change shall be implemented by the contractor until such time as the contractor receives an approved written change order from the authority.

4.3 Termination:

The Authority may terminate this contract immediately at any time the Contractor fails to carry out its responsibilities or to make substantial progress under this contract. Should the Authority decide to terminate under this provision, it shall first provide the Contractor with 10 days advance written notice of performance conditions which are endangering the contract's continuation. If after such notice the Contractor fails to remedy the conditions contained in the notice, within the time period contained in the notice, the Authority may issue the Contractor an order to cease and desist any and all work immediately. The Authority shall be obligated only for services rendered and accepted prior to the date of the notice of termination.

This contract may also be terminated by the Authority, without cause and without

penalty or surcharge for the sole benefit of the Authority, with thirty (30) days prior notice.

4.3.1 Termination of Agreement:

Termination of Causes Beyond Control of Contractor

The performance of Work under the Agreement may be terminated by the Authority, in its sole discretion, upon application by the Contractor for unforeseen causes beyond the control and without fault or negligence of the Contractor, including any Force Majeure even as defined in this Agreement, if such causes irrecoverably disrupt or render impossible the Contractor's performance hereunder. Upon termination pursuant to this section, Contractor shall submit a claim in accordance with the claims provisions of this Agreement, shall be reimbursed for all non-recoverable costs incurred for equipment, materials, software, supplies and services provided, supplied or produced for the benefit of the Project prior to the date of such termination, and all non-recoverable costs incurred for services and commercially reasonable quantities of products and materials received or ordered (if such orders cannot be canceled), not to exceed the Maximum Amount payable under the Agreement for such equipment, materials, products, software, supplies and/or services, if applicable. Such products and materials upon payment become the property of the Authority whether such acceptance occurs before or after such termination.

4.3.2 The Authority's Right of Termination:

The Authority reserves the right to terminate this Agreement immediately in the event of breach or failure of performance by the Contractor, or upon thirty (30) calendar days' written Notice to the Contractor if terminated for the convenience of the Authority as set forth in the Section 4.3 above.

Contractor shall notify Subcontractors and service or supply vendors providing Work under this Agreement of any early termination date of this Agreement. Failure to notify Subcontractors and service or supply vendors shall result in the Contractor being liable for the termination costs and all additional costs incurred by a Subcontractor and service or supply vendor after the Notice date for Work performed under this Agreement, except those specifically agreed to by the Authority in the termination Notice to the Contractor.

4.3.3 Termination for Cause

The Authority may terminate this Agreement and be relieved of any payments except as provided for under early termination should the Contractor materially fail to perform the requirements of this Agreement at the time and in the manner herein provided (Contractor "event of default"). In the event the Authority determines sufficient cause exists, it will send a Notice to cure to the Notice address set forth in this Agreement for Contractor. If Contractor fails to satisfactorily cure the problem (s) within ten (10) days of receiving written Notice from the Authority specifying the nature of the cause on event

of default shall be deemed to have occurred and the Authority may immediately cancel and/or terminate this Agreement and every right of the Contractor and any person claiming any right by or through the Contractor under this Agreement.

Events of material breach shall include, but not be limited to, failure to adhere to the Approved Project Schedule, failure to maintain required insurance; bankruptcy; failure to pay any Subcontractor or other company or person retained by Contractor in connection with this Agreement; Contractor refuses or negligently fails, except in cases for which extension of time is provided by the Authority, to supply sufficient properly skilled staff or proper materials to perform as required by this Agreement; or Contractor negligently or intentionally disregards or otherwise violates laws, ordinances, rules, regulations or orders of any public authority having jurisdiction; defective or unsatisfactory performance, or any other breach of any of the Contractor's obligations under the Contract Documents.

In the event of such termination, the Authority may proceed with the Work in any manner deemed proper by it. All actual and reasonable costs to the Authority in the event of termination for cause ("termination costs") together with any other applicable deductions shall be deducted from any sum due the Contractor under this Agreement and the balance, if any, shall be paid to the Contractor, subject to any retainage, within ninety (90) days after such termination costs have been ascertained by the Authority and Disentanglement (as defined below) has been completed. Termination costs include, but are not limited to the cost of soliciting a new contractor and any increase in the fees that must be paid to the new contractor.

4.4 Disentanglement:

Contractor acknowledges that the Work provided under the terms of this Agreement is vital to the Authority and must be continued without interruption. Upon any termination of this Agreement or upon the conclusion of the term of the Agreement, a successor may be responsible for providing this Work. The Contractor agrees to exercise its best efforts and cooperation to effect an orderly and efficient transition to a successor.

A. General Obligations

Upon termination of the Agreement, whether for cause or convenience, or upon conclusion of the term of the Agreement, Contractor shall accomplish a complete transition of the Work being terminated from Contractor and any Subcontractor to the Authority or to any replacement provider designated by the Authority, without any interruption of or adverse impact on the Work or any other Work provided by third parties (the "Disentanglement"). Contractor shall cooperate with the Authority and any new service provider and otherwise promptly take all steps required to assist the Authority in effecting a complete Disentanglement. Contractor shall provide all information regarding the Work or as

otherwise needed for Disentanglement, including date conversion, files, interface specifications, know-how transfer, training as the Authority may direct, including completion or partial completion of projects, documentation of Work in process, and other measures to assure an orderly transition to the Authority or the Authority's designee. All services related to Disentanglement prior to termination shall be deemed a part of the base Work and shall be performed by Contractor at no additional cost to the Authority. Contractor's obligation to provide the services shall not cease until Disentanglement is satisfactory to the Authority including the performance by Contractor of all asset-transfers and other obligations of Contractor provided in this section have been completed.

B. Disentanglement Process

This Disentanglement process shall begin on any of the following dates: (i) the date the Authority Notifies Contractor that the Agreement shall be terminated for convenience; (ii) the date designated by the Authority not earlier than sixty (60) days prior to the end of any initial or extended term that the Authority elected to extend pursuant to the Agreement; or (iii) the date any Termination Notice is delivered, if the Authority elects to terminate any or all the Work pursuant to this Agreement. Subject to Exhibit 1, Scope of Work, Contractor's obligation to perform Work, and the Authority's obligation to pay for Work, shall expire upon termination except that Contractor shall remain obligated to provide Disentanglement services at the Authority's request for up to twelve (12) months after any such termination date, and the Authority shall pay for those services at the rates set forth in the Agreement. Contractor and the Authority shall discuss in good faith a plan for determining the nature and extent of Contractor's Disentanglement obligations under this Agreement and provide all services necessary for Disentanglement shall not be lessened in any respect. Contractor shall develop with the successor contractor or the Authority's staff, a Contract Transition Plan describing the nature and extent of transition service required. The Contract Transition Plan and dates for transferring responsibilities for each division of Work shall be submitted within thirty (30) days of such Notice. Upon completion of the Authority's review, both parties will meet and resolve any additional requirements/differences. Contractor shall be required to perform its Disentanglement obligations on an expedited basis, as determined by the Authority, if the Authority terminates this Agreement for cause.

C. Specific Obligations

The Disentanglement shall include the performance of the following specific obligations:

1. Full Cooperation and Information

Upon Disentanglement, the parties shall cooperate fully with one another to facilitate a smooth transition of the Work being terminated from Contractor to the Authority or the Authority's designated replacement provider. Such cooperation shall include the provision (both before and after the cessation of Contractor's providing all or any part of the Work under this Agreement) by Contractor to the Authority of full, complete, detailed and sufficient information (including all information then being utilized by Contractor) to enable the Authority personnel (or that of a third party) to fully assume and continue without interruption the provision of the Work.

2. No Interruption or Adverse Impact

Contractor shall cooperate with the Authority and all of the Authority's other service providers as necessary to ensure a smooth transition at the time of the Disentanglement, with no interruption of Work, no adverse impact on the provision of Work or the Authority's activities, no interruption of any Work by third parties, and no adverse impact on the provision of services provided by third parties.

3. Third Party Authorizations

Without limiting the obligations of Contractor pursuant to any other clause herein, Contractor shall, subject to the terms of any third-party contracts, procure at no charge to the Authority any third-party authorizations necessary to grant the Authority the use and benefit of any third-party contracts between Contractor and third-party contractors used to provide Work, pending their assignment to the Authority.

4. Transfer of Assets

Contractor shall convey to the Authority all the Authority assets in Contractor's possession. If applicable, at the election of the Authority, Contractor shall convey to the Authority from among those assets then held by the Contractor for the provision of Work to the Authority such assets as the Authority may select, at a price consisting of the net book value. Contractor shall promptly

remove from the Authority premises any Contractor asset that the Authority, or its designee, chooses not to purchase.

5. Transfer of Leases, Licenses and Contracts

Contractor, at its expense, shall convey or assign to the Authority or its designee such leases, licenses and other contracts used by Contractor, the Authority, or any other person in connection with the Work, as the Authority may select. Contractor's obligation described herein, shall include Contractor's performance of all obligations under such leases, licenses and other contracts to be performed by it with respect to periods prior to the date of conveyance or assignment and Contractor shall indemnify, defend and hold harmless the Authority for any losses or liability resulting from any claim that Contractor did not perform any such obligations.

6. Delivery of Documentation

Contractor shall deliver to the Authority or its designee, at the Authority's request, all documentation and data related to the Authority, including the Authority's data, held by Contractor, and upon Approval by the Authority, Contractor shall destroy all copies thereof not turned over to the Authority, all at no charge to the Authority. Notwithstanding the foregoing, Contractor may retain one (1) copy of the documentation and data, excluding the Authority data, for archival purposes or warranty support.

5.0 Payment Schedule

5.1 *Payment Schedule*

Item	Percent Payment*	Cumulative Gross Payment*	Payment Minus Retainage	Cumulative Net Payment
Notice to Proceed/Mobilization	5%	5%	4.5%	4.5%
Project Management Plan Approved	2%	7%	1.8%	6.3%
Baseline Project Schedule Approved	3%	10%	2.7%	9.0%
Quality Assurance Plan/Software Development Plan Approved	2%	12%	1.8%	10.8%
Final System Requirements Document Approved	2%	14%	1.8%	12.6%
Draft Business Rules Approved	2%	16%	1.8%	14.4%
Comprehensive Draft System Detailed Design Document	5%	21%	4.5%	18.9%
Master Test Plan Approved	5%	26%	4.5%	23.4%
Final Business Rules Approved	5%	31%	4.5%	27.9%
Final System Detailed Design Document Updates Approved	5%	36%	4.5%	32.4%
Factory Test Approved	10%	46%	9.0%	41.4%
Final installation plan and 100% drawings Approved	10%	56%	9.0%	50.4%
On-site First Installation Test and Commissioning Test Approved (1 st plaza)	10%	66%	9.0%	59.4%
Commissioning Test Approved (2 nd Plaza)	5%	71%	4.5%	63.9%
Commissioning Test Approved (3 rd Plaza)	5%	76%	4.5%	68.4%
Commissioning Test Approved (4 th Plaza)	5%	81%	4.5%	72.9%
Operational Acceptance Test Approved (Provisional Project Acceptance)	10%	91%	9.0%	81.9%
Final manuals Approved	2%	93%	1.8%	83.7%
As built drawings Approved	2%	95%	1.8%	85.5%
Final Project Acceptance (including Software escrow approved by the	5%	100%	4.5%	90.0%

Authority)				
Retainage Release	10%	100.00%	10%	100.0%

* Before retainage of 10% per invoice

5.2 Invoices & Retainage:

The Contractor shall only submit invoices after the delivery by the Contractor and approval by the Authority of specific goods and services. The specific goods and services and the associated payment amounts are detailed in Section 5.1 above.

The Contractor shall submit such invoices, in arrears, to the Authority at the address on the face of the purchase order labeled "Invoice To" pursuant to the terms of the contracts resulting from this procurement.

Contractor invoices may not be submitted more than once monthly and State law forbids payment of invoices prior to receipt of services.

As stated in the payment schedule, all invoices shall be subject to 10% retainage which will be held by the Authority and only paid to the Contractor upon Project Acceptance.

5.3 Liquidated Damages:

The Contractor agrees that liquidated damages shall be imposed by this contract. The terms below shall in no way be considered exclusive and shall not limit the Authority or Authority's right to pursue any other additional remedy which the Authority may be entitled to pursue.

Liquidated damages in the amount of \$2,200 shall be paid by the Contractor to the Authority for every calendar day of delay in meeting the milestones identified in the section 3.0 Schedule above. The total amount of such liquidated damages shall not exceed the total amounts authorized to be paid pursuant to this Contract and any change orders subsequently approved by the Authority.

5.4 Third Party Certification:

The Contractor shall provide at its own expense the following third party reviews as further set forth in Exhibit F: Scope of Work and Technical Requirements 3.1.14 Third Party Financial Audit and 6.9 PCI Compliance Test Verification.

(a) Third Party Financial Audit: After the System has been placed into Revenue Service and as a condition of System Acceptance, the Contractor shall provide a financial audit of the system conducted by an independent third party certified auditor, approved by the Authority. The audit shall verify that the System properly collects tolls and correctly

reports and reconciles and otherwise meets current accepted accounting and auditing standards and guidelines.

(b) PCI Compliance: As a condition of System Acceptance the Contractor shall provide certification by an independent third party authorized to provide PCI compliance certification that the WVCSC and WVVPC is PCI compliant. Further, this PCI compliance shall be re-certified on an annual basis on or about the anniversary date of the initial certification for the duration of the Maintenance period.

6.0 SOFTWARE LICENSE AGREEMENT

DRAFT SOFTWARE LICENSE AGREEMENT

This **SOFTWARE LICENSE AGREEMENT** (this "**Agreement**") is made and entered into this ____ day of _____, 20__, by and between _____, a _____, with an address of _____ ("**Licensor**"), and West Virginia Parkways, Economic Development and Tourism Authority ("**Licensee**").

BACKGROUND

A. Licensor provides a suite of proprietary software and other products, which include various applications, features and functions for, among other things the use in an Upgraded Toll System including lane equipment, host computer, and customer service and violations processing center to manage accounts, process violations and reconcile transactions, as more fully described in the Contract Documents.

B. Licensee desires to license and use the foregoing software on the terms and conditions set forth below.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual covenants and agreements set forth herein, and intending to be legally bound hereby, the parties hereto agree as follows:

1. Definitions.

a) "**Applicable Laws**" means all current and future Federal, State and local laws and regulations applicable to Licensor and/or the Software and its operation, as such laws and regulations may be amended from time to time.

b) "**Confidential Information**" or "**Proprietary Information**" shall mean all of the information, data and software furnished by one party to the other, or such other information that would reasonably be considered to be confidential or proprietary, whether oral or in writing, graphic or machine readable form, which may include, but not be limited to, object code, source code, and software tool specifications, functions and features, integration and shared data block specifications. Proprietary Information or Confidential Information shall not include information which: (i) has been or is publicly disclosed by the party disclosing the information either prior to or subsequent to the receipt of such information by the receiving party; (ii) becomes generally known in the trade through no fault of the receiving party; (iii) has been lawfully disclosed to the receiving party by a third person to this Agreement who has lawfully acquired the Confidential or Proprietary Information; (iv) was independently developed by the receiving party.

c) "**Contract Documents**" shall have the meaning as prescribed in the Contract to which this Agreement is attached and included therewith.

d) "**Disabling Code**" means any virus, Trojan horse, worm, back door, time bomb, drop-dead device or other code, device or feature that (i) adversely affects the operation, security or integrity of a computing, telecommunications or other digital operating or processing system or environment (including without limitation, other programs, data, databases, computer libraries and computer and communications equipment) by altering, destroying, disrupting, delaying or inhibiting such operation, security or integrity or otherwise; (ii) without functional purpose, replicates itself without manual intervention; (iii) purports to perform a useful function but that actually performs a

destructive or harmful function, or (iv) performs no useful function and utilizes substantial computer, telecommunication or memory resources.

e) *"Documentation"* means all present and future user manuals, guides, training manuals, including all specifications, education materials, help files, "read me" files, and, except as Licensor and Licensee may expressly agree, shall include all web pages, promotional, marketing and similar materials produced by Licensor describing features, functions, qualities or performance of the Software, Licensor's response(s) to the RFP, and all other supporting material, and all other materials provided by Licensor in connection with the Contract Documents.

f) *"End User"* means any person authorized by Licensee to use the Software.

g) *"Escrow Agreement"* means that certain Software Escrow Agreement to be entered into by the parties as described herein, a copy of which is attached hereto as Exhibit "A."

h) *"Losses"* means, collectively, all claims, demands, suits, actions, proceedings, judgments, damages, settlements, costs, expenses, losses and loss contingencies, including all attorneys' fees and costs of suit.

i) *"RFP"* means Licensee's Request for Proposal dated_____, and any amendments, supplements or addenda thereto.

j) *"Software"* shall mean: (i) the software including all features and functions described in Licensor's sales literature and marketing presentations, all future features and functions added thereto, and all updates, enhancements, modifications or upgrades thereto, and all error corrections, patches and bug fixes provided by Licensor as described more fully in the Contract Documents and which is made part of the System (as that term is defined in the Contract Documents); (ii) all related or ancillary data files, modules, libraries, tutorial and demonstration programs, and other components of the Software; (iii) all Documentation; and (iv) all copies of the foregoing.

k) *"Third-Party Products"* means applications, applets, macros, routines, programs, code and other items of Software to which the rights are owned by parties other than Licensor or Licensee, regardless whether they are (i) embedded in the Software, (ii) provided as separate programs or applications on a stand-alone basis by Licensor along with Licensor's own products under sublicenses through Licensor, or (iii) provided under direct end user license agreements issued by Licensor as a reseller on the owner's behalf to Licensee. Third-Party Products also includes and databases, libraries and other information owned by parties other than Licensor or Licensee the rights to which are needed in order for the Software to perform the functions intended by Licensee.

2. **License and Term.** Licensor hereby grants to Licensee, and Licensee accepts, a perpetual, non-exclusive, transferable, assignable license to install, store, operate, and use the Software (the "License"). This Agreement shall continue in perpetuity unless otherwise terminated in accordance with the terms and conditions hereof.

3. **Scope of Use.**

a) The License allows an unlimited number of End Users to use the Software, who must be employees, agents, or contractors of Licensee, or otherwise authorized by Licensee to use the Software, at any location.

b) Licensee may have the Software hosted and operated on Licensee's behalf by third parties contracted by Licensee, at Licensee's expense, or may elect to receive assistance from a third party related to the use, implementation or customization of the Software.

c) Nothing in the Agreement shall imply any limitation on Licensee's right to relocate, close or alter existing facilities, or to establish or acquire new facilities.

4. **Relationship to Contract Documents.** To the extent that any terms, conditions, obligations or requirements of this Agreement contradict any terms, conditions, obligations or requirements of the Contract Documents, the terms, conditions, obligations and requirements of the Contract Documents

shall prevail.

5. **License and Other Fees; Payment Terms.** As full and complete consideration for the License, Licensee shall pay the fees set forth in the Contract Documents.

6. **Professional Services, Support, Maintenance, and Training.** Licensors will provide those professional services, support, maintenance and training in accordance with the Contract Documents for a period of time as described therein (the "Support Term"). Notwithstanding anything herein to the contrary, upon completion of the Support Term, Licensee shall have a right to modify and customize the Software, or to have the Software modified and customized by third-parties. Licensee shall have any such third parties agree to confidentiality restrictions at least as restrictive as those contained herein prior to allowing any third party to access the Software.

7. **Confidential and Proprietary Information.**

a) Each party shall not, except as expressly permitted in this Agreement or with the prior written consent of the other party, at any time use, copy, modify, disclose or transfer any Confidential or Proprietary Information to any person or entity except to further the performance of this Agreement. Failure to specifically designate any Confidential or Proprietary Information as being confidential or proprietary shall not affect whether such information is considered to be Confidential or Proprietary Information. All right, title and interest in any Confidential Information shall be and shall remain the exclusive property of the disclosing party. If the receiving party or any of its representatives become legally compelled (by deposition, interrogatory, request for documents, subpoena, civil investigative demand or similar process) to disclose any Confidential Information, receiving party shall use its best efforts to provide disclosing party with prompt prior written notice of such requirement so that disclosing party may seek a protective order or other appropriate remedy.

b) Each party agrees that the disclosing party shall suffer irreparable harm in the event that of a breach of any obligations under this Section and that monetary damages shall be inadequate to compensate the disclosing party for such breach. Accordingly, each party agrees that, in the event of a breach or threatened breach of any of the provisions of this Agreement, in addition to and not in limitation of any other rights, remedies or damages available at law or in equity, the disclosing party shall be entitled to a temporary restraining order, preliminary injunction and permanent injunction in order to prevent or restrain any such breach.

8. **Licensors Warranties.** Licensors represents, warrants, and agrees, that during the Support Term, as follows:

a) Licensors owns all worldwide right, title and interest in and to the Software and any data structures and architectures related thereto, including without limitation all modifications, enhancements, upgrades and new versions created or to be created by or on behalf of Licensors, all patent rights, copyrights, and trade secret rights embodying any of the foregoing, and all know-how, concepts, inventions and ideas related to the foregoing, or if Licensors does not own such rights, Licensors enjoys valid, binding and enforceable written licenses under the foregoing sufficient in scope and term for Licensors to grant the License and perform all duties under this Agreement. Licensors has the right to grant the License to access and use the same as set forth in this Agreement without violating any rights of any third parties, and there is currently no actual or threatened suit by any such third party based on an alleged violation of such right by Licensors;

b) Licensors is fully aware of Licensee's requirements and intended uses for the Software, including any set forth in the Contract Documents and the Documentation, and the Software shall satisfy such requirements in all material respects, and is fit for such intended uses;

c) Licensors will make such modifications to the Software from time to time as are necessary to keep the Software in full compliance with Applicable Laws, at Licensors's sole expense;

d) The Documentation will completely and accurately reflect the features, functions and

operation of Software in all material respects, and will identify and reflect any particular features of any of same which may affect the normal use and operation of the Software. Licensor will not eliminate or impair any material feature of function of the Software described in the Documentation without Licensee's prior written consent; and

e) The Software will not when delivered contain any Disabling Code. Licensor will not at any time disable or interfere with Licensee's use of the Software for any purpose (other than the protection of Licensee's data, systems or operations) without first obtaining Licensee's express consent or an appropriate court order to do so. Licensor shall take commercially reasonable steps to protect the introduction or coding of any Disabling Code into Licensee's information systems through the Software or otherwise.

9. **Licensor Enhancements.** Licensor shall provide to Licensee, without additional charge, copies of the Software and Documentation revised to reflect any enhancements to the Software made by Licensor during the Support Term. Such enhancements will be deemed to include all modifications to the Software which increase the speed, efficiency or ease of operation of the Software, or add additional capabilities to or *otherwise improve the functions of the Software.*

10. **Third-Party Products.**

a) Licensor hereby represents, warrants and agrees as follows with respect to all Third-Party Products and other products provided by Licensor to Licensee, that during the Support Term:

(i) Licensor is an authorized reseller or sublicensor of such products, and has all rights, authorizations, consents and licenses necessary to provide the Third-Party Products to Licensee hereunder. In the case of Third-Party Products for which Licensee is to be given a direct license from the owner (to which Licensor is not a party), Licensor is an agent and authorized reseller for such owner with the authority to bind the owner to all the terms and conditions set forth herein relative to such products; and

(ii) Licensor shall maintain and enforce all licenses and other rights needed to assure Licensee of the continued right to use all Third-Party Products sublicensed by Licensor to Licensee and all software created by third parties embedded in the Software.

b) If Licensor at any time does not have the right to sublicense or otherwise provide a Third-Party Product to Licensee (and such loss is not the result of Licensee's breach of obligations in connection therewith) Licensor will procure for Licensee the right to use the same product under a direct contractual arrangement between Licensee and the owner thereof, or, if that cannot be arranged, Licensor shall provide another comparable product with equal features, functions and performance, either via a sublicense through Licensor or by procuring a direct license between Licensee and the owner licensor of the substitute product, and with no charge to Licensee.

c) Except as Licensee may expressly agree, Licensor shall (a) support and maintain all Third-Party Products to the same extent and in the same manner as the Software, and (b) assign and pass through to Licensee all warranties and all support and maintenance provided to Licensor by the supplier of the applicable Third-Party Products, except to the extent the licensor thereof or another third party reasonably satisfactory to Licensee is actually providing warranty service or support and maintenance to Licensee with respect to such products.

d) Except as expressly disclosed by Licensor in writing, no Software or any portion thereof includes any Linux or other open source software or code provided under a general public license. The indemnities and warranties provided by Licensor in this Agreement shall expressly extend to all Linux and other open source or general public license software provided or procured by Licensor for Licensee hereunder, whether embedded, separately provided and licensed or otherwise.

11. **Source Code Escrow.** Upon delivery of the Software, the parties hereto shall enter into the Escrow Agreement, and shall agree to be bound to the terms and conditions thereof. This Section 11 is a specific and material aspect of this Agreement, and the parties would not enter into this Agreement if this section were not a part hereof.

12. Indemnities; Remedies; Insurance.

a) Licensor shall indemnify, defend and hold harmless Licensee from and against any and all Losses and otherwise in accordance with the terms and conditions of the Contract Documents.

b) If Licensee is enjoined from using the Software, or if Licensee reasonably believes that the Software may become the subject of a claim of intellectual property infringement, Licensee shall have those rights and remedies as described more fully in the Contract Documents, and Licensor hereby agrees to fulfill its obligations thereunder, including, but not limited to, securing the rights or replacements to such infringing Software so as to enable Licensee to continue to use the Software as described herein, but so that such use shall not infringe upon the intellectual property rights of any third party.

c) Licensor shall carry those types and levels of insurance as described more fully in the Contract Documents.

13. Default and Termination. The defaults and termination rights applicable to this Agreement, and certain of the remedies associated therewith, shall be as provided in the Contract Documents.

14. Miscellaneous.

a) All notices and requests in connection with this Agreement shall be provided in accordance with, and upon those terms and conditions as described in, the applicable provisions of the Contract Documents.

b) Licensor may not refer to Licensee in any advertising or publicity without obtaining Licensee's prior written consent.

c) The relationship of Licensor and Licensee established by this Agreement is that of independent contractors. Nothing in this Agreement shall be construed to create any partnership, joint venture, agency or other similar relationship between Licensor and Licensee. Neither party shall have any right, power or authority to assume, create or incur any expense, liability or obligation, express or implied, on behalf of the other.

d) No failure or delay of either party to exercise any rights or remedies under this Agreement shall operate as a waiver thereof, nor shall any single or partial exercise of any rights or remedies preclude any further or other exercise of the same or any other rights or remedies.

e) If any provision of this Agreement is held invalid or unenforceable in any circumstance by a court of competent jurisdiction, the remainder of this Agreement, and the application of such provision in any other circumstances and in any other jurisdiction shall not be affected thereby.

f) Nothing in this Agreement shall prevent either party from seeking equitable relief by way of one or more preliminary or permanent injunctions (i) restraining any act which would constitute a breach hereof, or (ii) compelling the performance of any obligation which, if not performed, would constitute a breach hereof, or (iii) if a party or any of its representatives breach or threaten to breach any of the provisions of this Agreement. Each party agrees to waive any requirement for the securing or posting of any bond (other than a nominal bond) in connection with this provision.

g) This Agreement shall be governed by and construed and enforced in accordance with State of West Virginia, excluding its principles of conflicts of law. Any suit, action, or proceeding that relates directly or indirectly to this Agreement or any event, transaction, or occurrence arising out of or in any way connection with this Agreement, or the dealings of the parties with respect thereto, shall be tried only by a court and not by a jury. Any suit, action or proceeding to enforce this Agreement or otherwise arising out of or relating to this Agreement or the transactions related hereto shall, in the sole discretion of Licensee, be instituted and maintained exclusively in the state court of West Virginia or the Federal District Court for West Virginia. The parties hereby irrevocably consent and submit to the exclusive jurisdiction and venue of any of such courts, and irrevocably waive any objection which they may now or hereinafter have to the laying of the venue of any suit, action or

proceeding brought in such court and any claim that such suit, action or proceeding brought in such a court has been brought in an inconvenient forum. This section is a specific and material aspect of this Agreement, and the parties would not enter into this Agreement if this section were not a part hereof.

h) All exhibits, schedules and appendices attached to this Agreement are incorporated into and form a part of this Agreement.

i) Headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning and interpretation of this Agreement.

j) This Agreement may be executed in one or more counterparts.

k) This Agreement constitutes the entire agreement of the parties, superseding any and all previous agreements and understandings whether oral or written. No modification or waiver of the provisions of this Agreement shall be valid or binding on either party unless in writing and signed by both parties.

l) The provisions of this Agreement that, by their nature, should survive termination hereof, including, but not limited to Sections 2, 4, 7, and 12, shall survive the termination or expiration of this Agreement.

IN WITNESS WHEREOF, the undersigned duly authorized representatives of the parties hereto have executed this Agreement under seal as of the date first above written.

[Licensor] By _____ Name: Title: Date: Address: Facsimile: E-mail:	[Licensee] West Virginia West Virginia Parkways, Economic Development and Tourism Authority By _____ Name: Title: Date: Address: Facsimile: E-mail:
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7.0 SOFTWARE ESCROW AGREEMENT

DRAFT SOFTWARE ESCROW AGREEMENT

This **SOFTWARE ESCROW AGREEMENT** (the “*Escrow Agreement*”) is made and entered into this ____ day of _____, 20__, by and among _____, a _____, with an address of _____ (“*Licensor*”), and “West Virginia West Virginia Parkways, Economic Development and Tourism Authority (“*Licensee*”), a _____, with an address of _____ and _____, with an address of _____ (the “*Escrowee*”).

Background

A. Licensor provides a suite of proprietary software and other products, which include various applications, features and functions for, among other things, the use in an Upgraded Toll System including lane equipment, host computer, and customer service and violations processing center to manage accounts, process violations and reconcile transactions, as more fully described in the Contract Documents, which it is licensing to Licensee pursuant to that certain License Agreement.

B. The License Agreement requires Licensor to designate and appoint a third party as escrowee to extend certain protections to Licensee as further described herein.

C. Escrowee is willing to accept such appointment.

D. Licensor, Licensee and Escrowee each intend this Agreement to set forth each of their respective rights and obligations in this regard.

Agreement

NOW, THEREFORE, in consideration of the mutual covenants and agreements set forth herein, and intending to be legally bound hereby, the parties hereto agree as follows:

1 Definitions.

1.1 “Contract Documents” shall have the meaning as prescribed in the License Agreement.

1.2 “License Agreement” shall mean that certain Software License Agreement dated as of the date hereof between Licensor and Licensee, of which this Escrow Agreement is an Exhibit.

1.3 “Software” shall have the meaning as prescribed in the License Agreement.

2 Appointment of Escrowee.

2.1 Designation of Escrowee. Licensor hereby nominates and appoints Escrowee as escrow agent for the uses and purposes hereinafter described, and Escrowee hereby accepts such appointment subject to the conditions and limitations of this Escrow Agreement. Unless the conditions to delivery of the Software to Licensee set forth in Section 4.1 hereof are satisfied, Escrowee shall continue to hold the Software until the termination or expiration of this Escrow Agreement.

2.2 Fee. Escrowee shall receive a fee for its services payable by Licensor in the amount of _____ (\$_____) annually, due and payable on execution hereof and on each anniversary of such date so long as this Escrow Agreement is in effect.

2.3 Term. The term of this Escrow Agreement shall commence as of the date first written above, and shall continue in effect through the delivery of the Software to Licensee as provided in Section 4 hereof.

3 Conditions. The conditions of this escrow are as follows:

3.1 Deposit. Licensor shall deposit the Software and its related source code and object code in a format that is commonly used in the industry with Escrowee for the use and benefit of Licensee. The materials delivered to Escrowee shall include all such source programs and technical documentation as are necessary to produce a machine executable form of the Software, including but not limited to source code, freeware, flowcharts and logic diagrams required for the normal use, maintenance, and correction of the most current version of Software now or hereafter provided to Licensee. Such materials shall be sufficient to allow Licensee to run and maintain the Software itself or to retain a third party to do so on Licensee's behalf. Escrowee shall treat the Software as confidential and proprietary information, and shall not, except as expressly permitted in this Escrow Agreement or with written consent of the parties hereto, at any time use, copy, modify, disclose or transfer any such information except to the extent necessary to carry out the intent of this Escrow Agreement. To the extent Escrowee is required to disclose or provide the Software or any information relating thereto to any third party, Escrowee will immediately notify Licensor and Licensee of the same, and to the extent legally possible, provide Licensor and/or Licensee with an opportunity to contest or defend against such disclosure;

3.2 Representations. Licensor represents that the escrow deposit is and shall at all times be a duplicate of the Software licensed and provided to Licensee under the License Agreement, as such Software may be updated or modified from time to time. Licensor shall identify each item delivered to Escrowee, and certify that the Software is the same as what is provided under the License Agreement, and that the Software is not "copy protected" and can be copied onto magnetic media for use as permitted by this Escrow Agreement and the License Agreement. Within five (5) days after receipt of the Software, Escrowee shall give Licensee written notice of such receipt. Escrowee shall have no responsibility to test, investigate or authenticate such Software, its identity or condition, and is entitled to rely upon the foregoing representation of Licensor;

3.3 Updates. Licensor shall, promptly upon development or the release thereof, deposit into escrow with Escrowee any and all updates, modifications, new releases and other changes and corrections to the Software, including, but not limited to, the most recent version of the Software, and those other materials as herein required, which, at a minimum, must be provided within ten (10) days of the time of (i) Approval of Factory Acceptance Test (FAT), (ii) Approval of Operational Test for Host and CSC/VPC (iii) Approval of Operational Test for in-lane equipment and (iv) Final Acceptance of the Full Upgraded Toll System.

3.4 Inspection. Licensee shall have the right to inspect the Software in escrow at anytime to determine the accuracy, completeness, sufficiency and quality of the Software deposited in escrow. To the extent the deposit is incomplete or unsatisfactory as determined by Licensee, Licensee shall notify Escrowee of such deficiencies or incompleteness, and Escrowee shall promptly contact Licensor, who shall promptly cure such deficiencies and/or inaccuracies.

4 Delivery.

4.1 Delivery of the Software by Escrowee. A copy of the Software shall be delivered by Escrowee to Licensee upon the occurrence of the following:

- a) Licenser notifies Escrowee in writing to effect such delivery to Licensee; or
- b) Escrowee receives from Licensee an affidavit from Licensee that one of the following has occurred: (1) the dissolution, liquidation or insolvency of Licenser, or the commencement of any action seeking the same, which action is acquiesced in by Licenser or which is not dismissed within 120 days of the date upon which it was instituted; (2) the appointment of a receiver, trustee, interim trustee or other custodian for Licenser or for all or substantially all of Licenser's assets; (3) the commencement of a case by Licenser under the Federal Bankruptcy Code, or the bringing of an action or petition by Licenser seeking relief under the Federal Bankruptcy Code or seeking similar relief or alleging that Licenser is insolvent or unable to pay its debts as they mature; or (4) the commencement of a case against Licenser under the Federal Bankruptcy Code, or an action or petition against Licenser is brought under the Federal Bankruptcy Code, or any action is brought seeking similar relief or alleging that Licenser is insolvent or unable to pay its debts as they mature, in each case which is consented to or acquiesced in by Licenser or is not dismissed within 120 days of the date upon which it was instituted; or
- c) Any of the Contract Documents is terminated for default as a result of a breach thereof by Licenser; or
- d) The Software fails to operate according to the Contract Documents and Licenser does not correct the error or defect within sixty (60) days of receipt of written notification thereof; or
- e) Upon the expiration of the Initial Term of Maintenance Contract (as that term is defined in the Contract Documents), unless such Contract Documents are extended, then upon expiration of such Contract Documents; or
- f) Licenser has ceased business operations and Licensee provides a statement of supporting facts and copies of such documentation as will enable Licenser to evaluate Licensee's claim promptly and effectively.

4.2 Licenser's Right to Object.

a) Within three (3) days of receiving notice of any of the events described in Section 4.1 above, Escrowee shall send to Licenser by certified mail, return receipt requested, a copy of such notice (to the extent possible). Licenser shall have ten (10) days from the date it receives such notice to notify Escrowee and Licensee in writing of its objection, if any, to the release of the Software. Such notice shall specify in detail Licenser's objections to the release of the Software.

b) If Licenser sends such written notice of objection to Escrowee within such ten (10) day period, representatives from each of Licenser and Licensee shall meet and engage in good faith discussions in an effort to resolve the dispute without the necessity of any formal proceeding. If the dispute cannot be resolved by such representatives, then Licenser or Licensee may initiate formal proceedings; provided, however, that formal proceedings for resolution of such dispute may not be commenced until thirty (30) days after Licenser submits the written notice of objection to Escrowee.

c) Notwithstanding Licenser's objection, and pending its resolution, Escrowee shall deliver the Software (or such portion as the Licensee requests) to Licensee in accordance with Licensee's instructions, and Licensee shall be entitled to use and enjoy the Software for the purposes permitted herein and in the License Agreement, subject to the provisions and limitations thereof.

d) If it is agreed or finally determined that Licensee did not have the right to receive the Software from Escrowee, Licensee shall return the Software to Escrowee and Licensee and Licensor shall continue to have any and all rights then available under the License Agreement.

5 Escrowee Action. In the event of any dispute between Licensor and Licensee regarding the rights provided hereunder, Escrowee shall have no responsibility to become a party to such dispute. In any such instance, Escrowee shall not be responsible for any alleged damage suffered or claimed either by Licensor or Licensee as a result of their dispute or as a result of Escrowee delivering the Software to Licensee.

6 Default and Termination. Any breach of this Escrow Agreement by Licensor shall also constitute a breach under the License Agreement, and upon any such breach, Licensee shall, in addition to any of its rights and remedies arising hereunder, have all of those rights and remedies as provided in the License Agreement and the Contract Documents.

7 Limitations.

7.1 Limitation on Responsibility of Escrowee.

a) In no event shall Escrowee be required to interpret the respective rights and obligations of the parties, the validity or meaning of their agreements or the entitlement of either one to the Software. The sole responsibility of Escrowee shall be to exercise reasonable care in holding the Software for the term of this Escrow Agreement unless the conditions to release of the Software described in Section 4 are met or an earlier order from a court of competent jurisdiction as to the disposition of such Software.

b) Escrowee shall be protected in acting upon any written notice, request, waiver, consent, certificate, receipt, authorization, power of attorney or other paper or document which Escrowee in good faith believes to be genuine and what it purports to be.

7.2 Counsel. Escrowee may consult with legal counsel in the event of any dispute or question as to the construction of any of the provisions hereof or its duties hereunder.

8 Miscellaneous.

8.1 All notices and requests in connection with this Escrow Agreement shall be provided in accordance with, and upon those terms and conditions as described in, the applicable provisions of the Contract Documents.

8.2 Licensor may not refer to Licensee in any advertising or publicity without obtaining Licensee's prior written consent.

8.3 The relationship of Licensor, Licensee and Escrowee established by this Escrow Agreement is that of independent contractors. Nothing in this Escrow Agreement shall be construed to create any partnership, joint venture, agency or other similar relationship between Licensor, Licensee and Escrowee. Neither party shall have any right, power or authority to assume, create or incur any expense, liability or obligation, express or implied, on behalf of the other.

8.4 No failure or delay of either party to exercise any rights or remedies under this Escrow

Agreement shall operate as a waiver thereof, nor shall any single or partial exercise of any rights or remedies preclude any further or other exercise of the same or any other rights or remedies.

8.5 If any provision of this Escrow Agreement is held invalid or unenforceable in any circumstance by a court of competent jurisdiction, the remainder of this Escrow Agreement, and the application of such provision in any other circumstances and in any other jurisdiction shall not be affected thereby.

8.6 Nothing in this Escrow Agreement shall prevent either party from seeking equitable relief by way of one or more preliminary or permanent injunctions (i) restraining any act which would constitute a breach hereof, or (ii) compelling the performance of any obligation which, if not performed, would constitute a breach hereof, or (iii) if a party or any of its representatives breach or threaten to breach any of the provisions of this Escrow Agreement. Each party agrees to waive any requirement for the securing or posting of any bond (other than a nominal bond) in connection with this provision.

8.7 This Escrow Agreement shall be governed by and construed and enforced in accordance with the State of West Virginia, excluding its principles of conflicts of law. Any suit, action, or proceeding that relates directly or indirectly to this Escrow Agreement or any event, transaction, or occurrence arising out of or in any way connection with this Escrow Agreement, or the dealings of the parties with respect thereto, shall be tried only by a court and not by a jury. Any suit, action or proceeding to enforce this Escrow Agreement or otherwise arising out of or relating to this Escrow Agreement or the transactions related hereto shall, in the sole discretion of Licensee, be instituted and maintained exclusively in the state court of West Virginia. The parties hereby irrevocably consent and submit to the exclusive jurisdiction and venue of any of such courts, and irrevocably waive any objection which they may now or hereinafter have to the laying of the venue of any suit, action or proceeding brought in such court and any claim that such suit, action or proceeding brought in such a court has been brought in an inconvenient forum. This section is a specific and material aspect of this Escrow Agreement, and the parties would not enter into this Escrow Agreement if this section were not a part hereof.

8.8 All exhibits, schedules and appendices attached to this Escrow Agreement are incorporated into and form a part of this Escrow Agreement.

8.9 Headings contained in this Escrow Agreement are for reference purposes only and shall not affect in any way the meaning and interpretation of this Escrow Agreement.

8.10 This Escrow Agreement may be executed in one or more counterparts.

8.11 This Escrow Agreement constitutes the entire agreement of the parties, superseding any and all previous agreements and understandings whether oral or written. No modification or waiver of the provisions of this Escrow Agreement shall be valid or binding on either party unless in writing and signed by both parties.

8.12 The provisions of this Escrow Agreement that, by their nature, should survive termination hereof, including, but not limited to Sections 4, 6, 7, and 8 shall survive the termination or expiration of this Escrow Agreement.

IN WITNESS WHEREOF, the parties have duly executed this Escrow Agreement as of the day and year first above written.

[Licensor] By _____ Name: Title: Date: Address: Facsimile:	West Virginia Parkways, Economic Development and Tourism Authority [Licensee] . By _____ Name: Title: Date: Address: Facsimile:
	[Escrowee] By _____ Name: Title: Date: Address: Facsimile:

8.0 ATTACHMENTS

8.1 FORM OF CONTRACT BOND

(form provided below)

8.2 FORM OF CONTRACT BOND CERTIFICATION

(WV Legal to provide copy)

8.3 FORM OF CERTIFICATE OF CORRECT PREPARATION AND ACCEPTANCE OF WORK

(WV Legal to provide copy)

8.4 FORM OF INSURANCE COVERAGE CERTIFICATES

(WV Legal to provide copy)

8.5 FORM OF INSURANCE CARRIER CERTIFICATION LETTER

(WV Legal to provide copy)

8.6 PUBLIC IMPROVEMENT CONTRACTS & DRUG-FREE WORKPLACE ACT (AFFIRMATION FORM?)

(WV Legal to provide copy)

8.7 FORM OF SMALL BUSINESS COMMITMENT LETTERS

(WV Legal to provide copy)